United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7159

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

NO. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION
and ELECTRO MOTIVE CORPORATION,
Plaintiffs-Appellees-Cross Appellants
vs.

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER,
SAUL LEWIS, IRVING BEIN, PHILIP BEIN
and J. KEVIN FOLEY;
JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE,
d/b/a APTER, NAHUM & LENGE,
Defendants-Appellants-Cross Appellees

P/S

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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REPLY TO POINT I

A. Plaintiffs' New Reliance On Canon 4 Is Occasioned By Their Desire For Immediate Disqualification Of Defendants' Counsel

In their Brief, Plaintiffs suddenly switch the focus of their earlier trial court arguments from the Canon 5 admonition prohibiting a lawyer from appearing as both witness and advocate, to the Canon 4 concern for preservation to a client of the duty of confidentiality owed him by his attorney.

This shift in emphasis can be explained by two factors. First, Judge Blumenfeld's order disqualifying Defendants' counsel as of the time of trial is logically consistent with the problem of "appearances" premising Judge Blumenfeld's decision and generally identified with the situation of lawyer as both advocate and witness. Consequently, Plaintiffs' acute desire to have Defendants' counsel immediately excluded is frustrated if the Canon 5 basis of Judge Blumenfeld's order is left intact.

Second, during the past several years this Court has shown a continuing interest in the problems of "confidentiality" resulting from "side-switching."[1] Commencing with Emle Industries, Inc. vs. Patentex, Inc. 478 F2d 562 (2nd Cir. 1973), the Court has emphasized that ethical considerations "require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage." Emle Industries, Inc. vs. Patentex, Inc. supra 571.[2] Thus, in factual cir-

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[1]The term "side-switching" is used as a shorthand description of the real, ostensible or potential breaches of the duty of confidentiality created when a lawyer accepts employment in a matter involving an interest adverse to that of a former client where the new matter is substantially related to the lawyer's former employment. See: General Motors Corp. vs. City of New York 501 F2d 639, 650 n. 20. (2nd Cir. 1974)

[2]The importance with which this Court views "side-switching" questions is underscored by the affording of ready and immediate review of district court rulings on such matters. See: Silver Chrysler Plymouth, Inc. vs. Chrysler Motors Corp. 496 F2d 800 (2nd Cir. 1974)

cumstances presenting variations of the usual Emle type situation -- an attorney switching sides to represent an interest adverse to his initial representation -- the Court stands ready to resolve any doubt in favor of disqualification. See: Hull vs. Celanese Corp. No. 74-2126 (2nd Cir. March 26, 1975) slip op. 2539, 2544. Consequently, if Plaintiffs can fit the present fact situation into an Emle type matrix, they have the advantage of the strict prophylactic rule and thereby achieve the immediate disqualification of Defendants' counsel.

B. The Facts Do Not Constitute An Emle Industries, Inc. vs. Patentex, Inc. Situation

Plaintiffs' shift in emphasis from Canon 5 to Canon 4 requires a corresponding restructuring of the underlying facts. Whereas in previous allegation and argument, Plaintiff IEC is presented as the sole stockholder of IECONN, Inc., incorporated for the purpose of acquiring ELMENCO stock and having that company merge into IECONN which then, by change of name, becomes Plaintiff Electro Motive Corporation. Plaintiffs now characterize ELMENCO as Electro Motive Corporation's "predecessor" implying thereby, an unbroken continuum of identity and interest. Obviously, by this characterization, Plaintiffs hope to slip into Emle type cloak and assume the posture of a jilted client who trusted his former lawyer too well and confided too much. However, Plaintiff Electro Motive Corporation can be considered the former client of Julius Apter and his former firm of Apter, Nahum & Lenge, only as the result of a supreme exultation of form over substance.

In their scramble to the leeward side of Emle, the Plaintiffs suggest their fear that "confidences obtained while acting...allegedly as attorneys for both Plaintiffs...could be used to the disadvantage of Plaintiffs." Plaintiffs' Brief p. 22. In this manner, Plaintiffs would gloss over the clear purport of allegations seeking recovery from buyers of the cost of sellers' legal services incident to the underlying transaction as a bargained for part of the sales

price;[3] Plaintiffs simply ignore their own denial of any such lawyer-client relationship and Attorney Shack's representation that his "firm served as counsel to IEC throughout the negotiations leading to the consummation of the merger," and that he "negotiated, line by line, the Agreement and Plan of Merger...signed by the parties." Joint Appendix pp. 15, 16.

In their haste to construct a factual picture similar enough to the Emle-type situation to prompt invocation of the strict prophylactic rule, Plaintiffs, as well, gloss over the fact that Julius Apter, former lawyer to ELMENCO by virtue of Plaintiffs' complaint, is also Julius Apter Defendant, accused of fraud and alleged liable for $2 million damages. Surely, Julius Apter, Defendant, is in this case to stay--the same Julius Apter who, under the label lawyer, and through his former law partners as surrogates, is to be dismissed from the action so as to preserve to Plaintiffs the inviolability of fanciful confidences. Will the disqualification of retired-lawyer, Julius Apter's former law partners, somehow perforce, sanitize Julius Apter Defendant? Hardly.[4] The only thing accomplished is the neutralization of Defendants' counsel of choice and the imposition on the Defendants of the additional burdens resulting from obtaining new counsel and familiarizing him with the case. Such results, while undoubtedly to be applauded by the Plaintiffs, would do nothing

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[3]cf. Disciplinary Rule 5-107 (B) Code of Professional Responsibility of the American Bar Association: "A lawyer shall not permit a person who...pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

[4]Plaintiffs' argument suggests that Julius Apter, Defendant, somehow is to be denied the right to defend himself against allegations of fraud and deceit with whatever information he may have in his consciousness as the result of his thirty-odd year, many capacitied association with ELMENCO. If such be the case, Julius Apter, by dint of his former profession, becomes a second-class citizen. This cannot be. The Canons do not prevent a practicing lawyer from defending himself. They should not be subverted to deny the right of self defense to a Defendant who happens to be a retired lawyer. cf. Meyerhofer vs. Empire Fire and Marine Insurance Co. 497 F2d 1190 (2nd Cir. 1974).

to "enforce the lawyer's duty of absolute fidelity and guard against the danger of inadvertent use of confidential information." Ceramo, Inc. vs. Lee Pharmaceuticals 510 F2d 268, 271 (2nd Cir. 1975).

C. Canon 4 Does Not Apply Where A Former Counsel To Plaintiff's Corporate Antecedent Is A Defendant

Complete candor between client and lawyer is fundamental to the proper functioning of the legal system.[5] Canon 4, therefore, enjoins the lawyer to preserve the confidences and secrets of his client so that the client may feel secure against some future, detrimental disclosure. Obviously, before Canon 4 can be called into play in this case, Plaintiffs must establish the fact of a lawyer-client relationship between themselves and Defendants' counsel. The only connection between Plaintiff Electro Motive Corporation as client, and Defendants' counsel as attorney is genealogical: A former partner in Defendants' counsel's firm, in times past, served as attorney to an ancestor on Plaintiffs' corporate family tree.

In assuming that mere identification of Julius Apter as former lawyer to ELMENCO will automatically trigger application of the Emle strict prophylactic rule, all doubts to be resolved in favor of disqualification as per Hull, Plaintiffs disregard this Court's indications that Emle does not create a rule without rhyme and a result without reason.

In Ceramco, Inc. vs. Lee Pharmaceuticals supra 271,[6] this Court held that "the kind of misconduct [charged], if it is misconduct, which is

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[5]See: Ethical Consideration 4-2, Addendum to Brief of Plaintiffs - Appellees - Cross Appellants, p. i. (hereinafter referred to as Plaintiffs' Brief)

[6]The case involved the appeal from Defendant's motion to disqualify Plaintiff's counsel on grounds of professional misconduct stemming from the attorney anonomously telephoning Defendant's order department to elicit facts going to questions of jurisdiction and venue. Defendants relied upon Canon 7 concerning zealous representation and Canon 9 dealing with the appearance of impropriety.

technical in character, does no violence to any of the fundamental values which the canons were written to protect and certainly falls far short of justifying a grant of [disqualification]. ...[D]isqualification has been found to be an appropriate remedy [when there is] involved a conflict of interest such that continued representation by chosen counsel clearly prejudiced the rights of the opposing party and, by creating the appearance of impropriety, posed a substantial threat to the integrity of the judicial process." (emphasis added)

If out of Plaintiff Electro Motive's corporate evolution a relationship of client to lawyer can be found to have existed between Electro Motive and Defendants' counsel, that relationship, at very most, is technical in character.

If Plaintiffs are worried about the disclosure by Julius Apter, retired attorney and former counsel to ELMENCO, of corporate secrets, they of necessity must be equally concerned about the self-same disclosures by Julius Apter, Defendant. To that, there can be no Canon 4 defense.

In actuality, Plaintiffs cannot honestly contend that they ever considered Julius Apter or his former law firm to be their lawyers. Nor can Plaintiffs represent that they ever disclosed a single fact in reliance upon a duty of lawyer-client confidentiality presumed due them from Julius Apter or his former partners.

No fundamental value to be protected by Canon 4 is violated, and there is no prejudice, clear or otherwise, to Plaintiffs' legitimate rights occasioned by the continued appearance of Defendants' counsel. The integrity of the judicial process is not threatened by allowing a retired attorney to engage his former partners to defend him against allegations of fraud and deceit. The substantial threat to the integrity of the judicial process comes instead from the use of makeweight ethical arguments to achieve tactical, harrassment goals.

REPLY TO POINT II

A. Plaintiffs' Allegations Of Champerty Are Unfounded And Unseemly

By their citation of DR 5-103 coupled with oblique reference to "Defendants' counsel's financial interest in the outcome of this litigation"[7] Plaintiffs revive their earlier suggestion made to the trial court that Defendants' counsel is guilty of champerty.[8] Clearly, the language of DR 5-103[9] is the American Bar Association's attempt to codify a prohibition against a person, not a party to a suit, bargaining to aid in its prosecution in exchange for a share of what is at issue.

The calumny implicit in this suggestion is outweighed only by its irrelevance to this action.[10] The financial connection of Julius Apter, as a shareholder of ELMENCO, long predated Plaintiffs' appearance on the scene. Certainly, it was in no way the acquisition of a proprietary interest in the subject matter of litigation; as a selling shareholder, Julius Apter had to have owned his stock interest prior to the institution of this suit, which charges misrepresentations in connection with that sale.

B. Plaintiffs Argue From The Words Of Canon 9 And Ignore Its Purpose

Plaintiffs' interjection of a Canon 9 "appearance of professional impropriety" argument does nothing to substantiate their accusation of champerty. Both the ethical considerations and disciplinary rules elaborating upon Canon 9 demonstrate that the concern of that Canon is with, first, problems incident to former judicial officers and public employees taking on private

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[7]Plaintiffs' Brief p. 32

[8]See: Brief of Defendants-Appellants p. 18 (hereinafter referred to as Defendants' Brief)

[9]Plaintiffs' Brief, Addendum p. iv.

[10]cf. DR 7-106(c): "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."

employment as lawyer[11] and, second, the administration and protection of client's funds in the hands of the lawyer.[12]

C. The Canons Do Not Warrant Disqualification of Defendants' Counsel

Plaintiffs' attempts to mix the oil of Canon 9 with the waters of Canons 4 and 5 demonstrate the essential inconsistency of their position. They demand as their due, Canon 5 loyalty arising from a professional relationship unclaimed by the putative lawyer and denied by the putative client. And, as if it logically follows, they then express what, if true, would be the more appropriate concern of the Defendants: that there is "a doubt or suspicion of real or apparent lack of objectivity" on the part of Defendants' counsel which "may affect their judgment as to litigation strategy, the possibilities of settlement or other aspects of this litigation."[13] Plaintiffs seem to be arguing that a litigant's doubts and suspicions about opposing counsel's objectivity are enough to bring Canon 9 into play; however, they buttress their argument by citation of Emle language stating the importance of protecting the Canon 4 duty of confidentiality from even the semblance of breach.

The observation that International Electronics, Inc. sired IECONN which married ELMENCO and begat Electro Motive Corp. does not create a professional relationship between the offspring of the marriage and the bride's former lawyer. Consequently, Canon 4 does not pertain.

The fact that Defendants, including Julius Apter, are represented by

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[11]See: General Motors Corp. vs. City of New York, supra.

[12]If by reference to "Defendants' counsel's financial interest in the outcome of this litigation," Plaintiffs have reference to the Apter, Nahum & Lenge counterclaim, they forced such a counterclaim by making Apter, Nahum & Lenge a party to their complaint. See: Rule 13a, Fed. R. Civ. Pro. If, despite the inapplicability of Canon 9 to this situation, Plaintiffs are concerned by the "appearances" created by the Apter, Nahum & Lenge counterclaim, then Apter, Nahum & Lenge would join with Plaintiffs in severing the counterclaim from the rest of the litigation. Rule 42(b) Fed. R. Civ. Pro.

[13]Plaintiffs' Brief p. 32

Julius Apter's former law partner does not darken the stain of self interest which naturally will color the testimony of Julius Apter in the eyes of the trier. Consequently, the purposes of Canon 5 would not be advanced by disqualifying Defendants' counsel.

Obviously, Plaintiffs' subjective preceptions of the ethical appearances are influenced more by desire to eliminate Defendants' counsel from the case than by any circumstance within the perview of Canon 9.

REPLY TO POINT III

A. Defendant Apter, Nahum & Lenge Is Not Merely A Passive Stakeholder

Plaintiffs contend that since their complaint "seeks no affirmative relief against the assets of the Apter firm," it is merely a stakeholder with nothing to defend.[14] While it may be correct that no affirmative relief is sought directly against the assets of Apter, Nahum & Lenge, the claims asserted by Plaintiffs' complaint impose the obligation and responsibility of defense under the escrow-indemnification provisions of the agreement which is the basis of this action. Joint Appendix pp. 35, 43-56.

The "agent" role of Apter, Nahum & Lenge contemplated by the escrow-indemnification arrangement is not that of passive stakeholder. On the contrary, the arrangement explicitly envisions the "agent" as lawyer actively defending against claims made upon the escrow fund. As signatories to the agreement which imposes the obligation and responsibility of defense upon Apter, Nahum & Lenge, Plaintiffs are estopped from frustrating that defense by the expedient of naming Apter, Nahum & Lenge as Defendants.

B. By Claiming Against The Escrow Fund, Plaintiffs Are Estopped From Denying Apter, Nahum & Lenge's Right To Defend

It is the Plaintiffs who claim that damages resulting from alleged

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[14]Defendants find nothing in the statutes or Rules pertinent to this case creating a Defendant class which is denied the right of defense accorded by 28 USC §1654.

misrepresentations are answerable out of the escrow fund. Therefore, it is the Plaintiffs, by their allegations, who have created the identity of interests between the so-called "conspiring" Defendants on the one hand and Apter, Nahum & Lenge, "agent" Defendants on the other.

It is the Plaintiffs, as parties to the subject Agreement, who acknowledge Apter, Nahum & Lenge's right and standing to participate in the defense of claims made against the escrow fund.

The firm of Apter, Nahum & Lenge as attorneys is very much a part of this action because of the obligation it has to defend claims against the escrow fund. If, as asserted by Plaintiffs, the "pro se argument advanced by the Apter firm is a transparent effort to remain in this case as attorneys," then through the transparancy one can plainly see the speciousness of the arguments fashioned by Plaintiffs to get Apter, Nahum & Lenge out of the case.

Plaintiffs conclude Point III of their Brief by returning yet again to their irrelevant Canon 4 "confidentiality" argument. In so doing, they implicitly concede the equal irrelevance of their portrayal of Apter, Nahum & Lenge as nothing more than invited observers to this suit.

REPLY TO POINT IV

Canon 5, EC 5-1, EC 5-2, DR 5-105 And Grievance Committee vs. Rottner

From the assertion that Defendants cite no Canon or case to support their arguments to disqualify Murtha, Cullina, Richter and Pinney, it would appear that Plaintiffs could not find time to read pages 15 through 20 of Defendants' Brief.

By way of reiteration, Defendants cite Plaintiffs to Canon 5, EC 5-1, EC 5-2, DR 5-105 and Grievance Committee vs. Rottner 152 Conn. 49 (1964).

Plaintiffs appear content to rely upon Judge Blumenfeld's incorrect conclusion in denying Defendants' motion to disqualify Murtha, Cullina, Richter and Pinney, that "Mr. Richter is acting as attorney for the estate - not for [Morris] Apter," the executor. Joint Appendix p. 58.[15]

Defendants contend that the importance of the attorney to the executor is twofold. Defendants earlier pointed out the individual liabilities to which the executor is exposed while acting in his fiduciary capacity. Defendants' Brief p. 15-16. The executor's reliance upon the "estate's attorney" for protection from such personal liability necessarily follows.

Secondly, but of equal importance, is the confidence which an executor must have in his attorney's loyalty to insure efficient administration of the estate. This Court recognized such a need in the circumstance of trustee in bankruptcy to attorney. "The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously." In re Mandell 69 F2d 830, 831 (2nd Cir. 1934). The relationship between executor and his attorney is analogous to that between trustee in bankruptcy and his attorney.

Plaintiffs argue as if "Executor" were a surname and Mr. Morris Apter Executor was an experiential stranger to Mr. Morris Apter. The argument, while formalistically neat, is realistically sloppy. Mr. Morris Apter Executor is aware of the Murtha, Cullina, Richter and Pinney accusation that Mr. Morris Apter is incapable of exercising independent professional judgment. While Murtha, Cullina, Richter and Pinney may be entitled to their opinion,

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[15]Plaintiffs' repeated assertions that "no affirmative recovery is sought against the Apter firm" suggests that such a claim is the sine qua non of any default in the loyalty which Attorney Richter may owe his client Morris Apter, Executor; no claim for dollars ergo, no Canon 5 disloyalty. However, persistency of assertion does little to answer the Fifth Circuit's observation that, as between attorney and client, "hostility or adverse positions need not always be of an economic character." Singleton vs. Foreman 435 F2d 962, 970 (5th Cir. 1970).

Morris Apter is entitled to their loyalty.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CURCIUT

INTERNATIONAL ELECTRONICS CORPORATION and ELECTRO MOTIVE CORPORATION,
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vs.

DOCKET NO. 75-7159

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Defendants-Appellants-Cross Appellees

CERTIFICATE OF SERVICE

This is to certify that true copies of the within Reply Brief were deposited in the United States Mails, first class postage prepaid, addressed to the following attorneys:

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on this 23rd day of May, 1975.

Morris Apter
Attorney